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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933.

No. 585

JOHN POKORA,

Petitioner,

vs.

THE WABASH RAILWAY COMPANY, A CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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I.

STATEMENT OF THE CASE.

A concise and accurate statement of the case appears in the opinion of the Circuit Court of Appeals (Trans., 68-70). (66 F. (2nd) 166)

We will add to that statement of fact that Petitioner did not see the train in question.

Petitioner's evidence as to this fact is as follows:

> "I saw nothing and that is all I know (Trans., 29). I don't know what hit me even (Trans., 30). I did not see the train at all. The next thing I know I was in the hospital. I have never seen the train. I don't know what hit me (Trans., 33)."

ARGUMENT.

Summary of the Argument.

Point A. The document purported to be a "Petition for a Writ of Certiorari and Brief of Petitioner in support thereof" served upon Respondent, does not contain a Petition for the Writ.

Point B. The purported Petition and Brief of Petitioner do not comply with the rules of this Court.

Point C. The Decision and Judgment of the Circuit Court of Appeals is in strict conformity with the decision of this Court in *Baltimore and Ohio Railroad Company* v. *Goodman*, 275 U. S. 66.

Point D. There is no substantial evidence supporting the charge of willfulness.

Point A.

This point requires no elaboration. There is no Petition for a Writ of Certiorari, nor any prayer therefor and there is nothing upon which this Court should act. The only semblance to a prayer is found in the last paragraph of the argument on page 28 of Petitioner's Brief wherein counsel for Petitioner says:

> "In the opinion of Counsel for Petitioner the opinion in the Goodman case should be modified * * *."

Point B.

The purported Petition does not comply with Rule 38 of this Court.

1.

It does not "contain only a summary and short statement of the matter involved and the reasons relied on for the allowance of the writ".

2.

The Brief is not direct and concise and in conformity with Rule 27.

3.

The purported Petition and Brief do not set forth any special or important reasons for the granting of the Writ of Certiorari as required by Paragraph 5 of Rule 38 of this Court.

This case grows out of an ordinary grade crossing accident where the view of the traveler on the highway was obstructed.

The purported Petition and Brief of Petitioner consists almost entirely of a reprint of Brief of Petitioner filed in the Circuit Court of Appeals for the Seventh Circuit, setting forth in detail the pleadings and the evidence of all the witnesses.

POINT C.

The Circuit Court of Appeals for the Seventh Circuit based its decision squarely upon the doctrine announced by this Court in *Baltimore and Ohio Railroad Company* v. *Goodman*, 275 U. S. 66.

Petitioner does not point out wherein said decision is in conflict with that of any other Circuit Court of Appeals nor in conflict with the decision of this Court.

Petitioner devotes a large portion of his brief to a discussion of the negligence of Respondent which is not the question involved in this application. The sole question is the standard of care applicable to Petitioner. True, there are some reported cases wherein Circuit Courts of Appeal have distinguished the cases under consideration from the Goodman case.

No case is reported wherein a plaintiff has sustained a recovery when he was familiar with the crossing and the movement of the train involved, when it was broad daylight, when he stopped where his view was obstructed, when his hearing was interfered with by his own motor and other distracting noises, when he knew that there was no crossing watchman on duty at the time and where he could by taking other ordinary precautions, have avoided the accident.

Petitioner cites as on all fours, the case of *Teague* v. *St. Louis S. Western Ry. Co.* 36 F. (2nd) 217 (Petitioner's Brief, page 16).

We will discuss this case as a sample:

1.

The negligence charged was the failure to maintain a proper warning of the approaching train, whereas in the case at Bar the negligence charged was in the operation of the train.

2.

Plaintiff was not familiar with the crossing. In the case at Bar, Plaintiff was familiar with both the crossing and movement of train.

3.

Electric gong across the track was silent and Plaintiff relied on it as indicating that no train was dangerously near.

4.

Electric gong had been out of repair for three weeks but no notice was posted of its condition.

In the case at Bar a plat showing the entire situation was introduced in evidence but was not embodied in the Bill of Exceptions.

By consent of counsel this plat was submitted to the Circuit Court of Appeals but it is not in the record submitted to this Court.

In his brief (page 20) counsel for Petitioner says that before this suit was brought he was familiar with the holdings in the Goodman case (275 U. S. 66) and the Zayac case (30 F. (2nd) 764).

No doubt that was the reason that the suit was instituted in the State Court rather than the Federal Court.

POINT D.

While the Trial Court held that the willful count stated a good cause of action, both the Trial Court and the Circuit Court of Appeals found no substantial evidence to support such a charge.

Petitioner in his Brief Points VIII, IX, X and XI, pp. 16-18, cites cases mostly from Illinois, but he cites no case from any Federal Jurisdiction to sustain a charge of willfulness as construed by the Federal Courts.

IT IS THEREFORE RESPECTFULLY SUBMITTED that this case is not a proper one for review by Certiorari in this Court, and that the purported Petition for a Writ of Certiorari should be denied.

DATED December 7, 1933.

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Of Counsel.